

STATE OF MICHIGAN
COURT OF APPEALS

ANN HERR and GARY HERR,

Plaintiffs-Appellants,

v

KEN MOSES,

Defendant-Appellee.

UNPUBLISHED
February 10, 2004

No. 242936
Oakland Circuit Court
LC No. 2001-033957-NO

Before: Owens, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted from an order granting summary disposition in favor of defendant. We reverse and remand for further proceedings consistent with this opinion.

The sole issue presented by plaintiffs is whether the trial court erred by allowing defendant to assert the open and obvious doctrine as a defense to plaintiff Ann Herr's claim when liability was premised on the defendant landlord's duty to keep the premises in reasonable repair as statutorily mandated by MCL 554.139. At the time of the trial court's ruling, this Court had not yet decided *O'Donnell v Garasic*, ___ Mich App ___; ___ NW2d ___ (2003). We find this Court's opinion in *O'Donnell* controlling on this case. Similarly to the case at hand, the plaintiff in *O'Donnell* was aware of a problem with a staircase, admitted she had seen the problem, and acknowledged that she knew the staircase presented difficulty if not properly negotiated. Following a lengthy analysis of the development of a statutory duty exception to the defense of open and obvious, this Court opined that "[t]he open and obvious doctrine is not available to deny liability to an injured invitee on leased or licensed residential premises when such premises presents a material breach of the specific statutory duty imposed on owners of residential properties to maintain their premises in reasonable repair and in accordance with the health and safety laws" *Id.* at slip op 7. Furthermore, this Court held that the issue of a statutory duty exception to the open and obvious doctrine "required both factual and legal development" We find that the similar factual pattern set forth in the present case necessitates that we reverse the trial court's ruling and remand for further proceedings in accord with this Court's opinion.

Also, because we are bound to view the evidence in the light most favorable to plaintiff, we would be remiss not to reverse the trial court's finding of fact that "it was not the stakes that even caused her fall." Review of deposition testimony indicates that plaintiff testified that the stakes had led to her fall. Such findings are left to the jury and present a genuine issue of

material fact regarding the nature of plaintiff's fall, thus precluding the granting of summary disposition under MCR 2.116(C)(10).

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Stephen L. Borrello